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IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON

D.N.,

Plaintiff

v.

United States of America,

Defendant

Civil No. 09-6180-AA

REPLY IN SUPPORT OF PLAINTIFF D.N.'S  
MOTION FOR SUMMARY JUDGMENT

Plaintiff D.N., by and through undersigned counsel, hereby submits this Reply in support of  
Plaintiff D.N.'s Motion for Summary Judgment as follows:

**Argument**

The United States argues that under ORS 112.465 because Ms. Northon pled guilty to  
manslaughter in the first degree on July 1, 2001, and was therefore a "slayer" as defined by ORS  
112.455(2)(2001), she is treated as predeceasing Mr. Northon, and that as a result the payment  
under Mr. Northon's pension plan cannot be income to Ms. Northon. As in effect in 2001, ORS  
112.465 (2001) provided as follows:

1 Property that would have passed from the decedent or the estate of the decedent to  
 2 the slayer *by intestate succession, by will or by trust* shall pass and be vested as if  
 the slayer or abuser had predeceased the decedent. [emphasis added]

3 Plaintiff responded noting that the subject property does not pass “by intestate succession,  
 4 by will or by trust”, and instead passed by beneficiary designation. The passing of the  
 5 subject property is controlled by ORS 112.515, not ORS 112.465. As in effect in 2001,  
 6 ORS 112.515 provides as follows:

7  
 8 Proceeds payable to or for the benefit of the slayer as beneficiary or assignee of the decedent  
 9 of the following interests shall be paid to the secondary beneficiary, or if there is no  
 secondary beneficiary, to the personal representative of the decedent’s estate:

10 \* \* \* \*

11 (4) Proceeds under any pension, profit-sharing or other plan.

12 The Oregon statute controlling the distribution of the plan benefits does not include the  
 13 predecease language the United States originally relied upon. The United States now  
 14 suggests that despite the difference in the language between ORS 112.465 (2001) and ORS  
 15 112.515 (2001) should be ignored because “the absence of [the “predeceased”] language in  
 16 no way implies that slayers are somehow permitted to retain the benefits of pension funds  
 17 obtained as a result of their crimes.” The fact that the legislature used different language  
 18 suggests that the difference was intended. ORS 174.010<sup>1</sup>; see also *Swarens v. Department of*  
 19 *Revenue*, 320 Or 326 P2d 852 (1994). There is no support for the United States’ position  
 20 that Ms. Northon is treated as predeceasing Mr. Northon, or that the determination of Ms.  
 21 Northon as a slayer should be given retroactive effect.  
 22  
 23

24 <sup>1</sup> ORS 174.010 provides as follows: In the construction of a statute, the office of the judge is simply to ascertain and  
 25 declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has  
 been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as  
 will give effect to all.

1           The United States tries to paint Plaintiff as arguing that Ms. Northon should or could  
2 retain the plan benefits. That is not true. What Ms. Northon did retain was the benefit of the  
3 bargain she received by using the plan proceeds as consideration for a plea bargain that  
4 resulted in a significantly shorter sentence than what could have been imposed if she had  
5 been convicted of the original charge. Having received the benefit of the bargain, Ms.  
6 Northon should not be allowed to escape the taxation of plan benefits she used for her own  
7 benefit.  
8

9           The United States policy argument suggests that Plaintiff's position would result in  
10 some benefit to Ms. Northon or other slayers. Ms. Northon did receive a benefit from the  
11 plan by using it as partial consideration for a plea bargain. That benefit resulted from the  
12 negotiations entered into between Ms. Northon and the prosecutor. That is not a benefit that  
13 Plaintiff created or had any control over. The United States' argument would give Ms.  
14 Northon a further benefit by not requiring her to take the plan benefits she used into income,  
15 and instead allow Ms. Northon to assign the tax obligation to Plaintiff.  
16

17           Finally, the United States has not distinguished *Darby*. The United States argues that  
18 Ms. Northon is categorically ineligible to be the distributee under Oregon law, but she  
19 became ineligible to receive the plan benefits only as a result of a plea bargain obtained  
20 using the plan benefits as partial consideration. Under *Darby*, Ms. Northon was eligible to  
21 be a distributee because she was a named beneficiary. Furthermore, Plaintiff's actual receipt  
22 of the benefits does not make the recipient a distributee required to take the plan benefits  
23 into income. Plaintiff's position is consistent with longstanding rule that taxation of income  
24 does not require reduction to possession. *Harrison v. Schaffner*, 312 U.S. 579 (1941);  
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1 *Helvering v. Horst*, 311 U.S. 112 (1940); *Lucas v. Earl*, 281 U.S. 111 (1930). Plaintiff's  
2 position also accounts for Ms. Northon's use of the plan benefits to secure a plea bargain.

3 **Conclusion**

4 D.N. requests that Defendant's Motion to Dismiss, and alternative Motion for Summary  
5 Judgment be denied. D.N. further requests that D.N.'s Motion for Summary Judgment be granted.

6 Dated this 12<sup>th</sup> day of November, 2009.  
7

8  
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**CERTIFICATE OF SERVICE**

It is hereby certified that service of the foregoing **REPLY IN SUPPORT OF PLAINTIFF D.N.'S MOTION FOR SUMMARY JUDGMENT** has been made this 12<sup>th</sup> day of November, 2009, by placing copies in the United States Mail addressed to the following:

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